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2 UNITED STATES DISTRICT COURT  
3 SOUTHERN DISTRICT OF NEW YORK  
4 Civil Action No.: 16-cv-951 (LAK)

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6 DANIEL KLEEBERG, LISA STEIN and AUDREY HAYS,

7

Plaintiff,

8

-against-

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10 LESTER EBER; ALEXBAY, LLC f/k/a LESTER EBER,  
11 LLC; CANANDAIGUA NATIONAL CORPORATION d/b/a  
12 CANANDAIGUA NATIONAL BANK & TRUST; ELLIOT  
13 W. GUMAER, JR.; EBER BROS. & CO., INC., EBER  
14 BROTHERS WINE AND LIQUOR CORPORATION;  
15 BROS. WINE AND LIQUOR METRO, INC.,  
16 EBER-CONNECTICUT, LLC; and WENDY EBER,

Defendants.

17 -----x

18 1250 Broadway  
19 New York, New York 10001  
20 February 28, 2019  
21 9:45 a.m.

22 EXAMINATION BEFORE TRIAL OF WENDY EBER, held at  
23 the above-mentioned time and place before ANNMARIE  
24 OAKLEY, a Notary Public of the State of New York.

25

PLAINTIFF'S  
EXHIBIT

177

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| <p>1<br/>2 APPEARANCES<br/>3<br/>4 BROOK &amp; ASSOCIATES PLLC<br/>Attorneys for Plaintiffs<br/>5 100 Church Street, 8th Floor<br/>New York, New York 10007<br/>6<br/>7 BY: BRIAN BROOK, ESQ.<br/>8<br/>9 UNDERBERG &amp; KESSLER LLP<br/>Attorneys for Defendants<br/>10 LESTER EBER; ALEXBAY, LLC f/k/a LESTER EBER, LLC;<br/>EBER BROTHERS &amp; CO., INC; EBER BROS. WINE AND LIQUOR<br/>11 CORPORATION; EBER BROS. WINE AND LIQUOR METRO, INC.,<br/>EBER-CONNECTICUT, LLC; and WENDY EBER<br/>12 50 Fountain Plaza<br/>Buffalo, New York 14202<br/>13<br/>BY: COLIN RAMSEY, ESQ.<br/>14<br/>15 JOHN HERBERT, ESQ. (Telephonically)<br/>Attorneys for Defendants<br/>16 LESTER EBER and WENDY EBER<br/>PO Box 1031<br/>17 Tiburone, California 94920<br/>18<br/>19 CALIHAN LAW PLLC<br/>Attorneys for Defendant<br/>20 THE ESTATE OF ELLIOT W. GUMAER<br/>16 Main Street<br/>21 Rochester, New York 14614<br/>22 BY: ROBERT B. CALIHAN, ESQ.<br/>23<br/>24 Also present: Howard Brodsky, videographer<br/>25</p> | <p>Page 2</p> <p>1 W. EBER<br/>2 VIDEOGRAPHER: Good morning. Here begins<br/>3 the video recorded testimony of Wendy Eber taken by<br/>4 the plaintiffs in the matter or Daniel Kleeberg et<br/>5 al plaintiffs versus Lester Eber et al defendants,<br/>6 index number 16-cv-9517 (LAK) in the United States<br/>7 District Court Southern District of New York. This<br/>8 deposition is proceeding at Veritext Legal Solution<br/>9 1250 Broadway, Suite 2400, New York, New York<br/>10 10001, on Thursday February 28, 2019 at<br/>11 approximately 9:46.<br/>12 My name is Howard Brodsky and I'm a legal<br/>13 video specialist in association with Veritext Legal<br/>14 Solutions with offices located in New York, New<br/>15 York. The court reporter is AnnMarie Oakley in<br/>16 association with Veritext. Will counsel, please,<br/>17 state their appearances for the record.<br/>18 MR. BROOK: Brian Brook of Brook &amp;<br/>19 Associates, PLLC, for the plaintiffs.<br/>20 MR. RAMSEY: Colin Ramsey from Underberg &amp;<br/>21 Kessler for the Eber defendants.<br/>22 MR. CALIHAN: Rob Calihan from Calihan<br/>23 Law on behalf of the estate of Mike Gumaer.<br/>24 VIDEOGRAPHER: Will remote counsel,<br/>25 please, state his appearance.</p> |
| <p>1<br/>2 STIPULATIONS<br/>3 IT IS HEREBY STIPULATED AND AGREED, by and<br/>4 among counsel for the respective parties hereto,<br/>5 that the filing, sealing and certification of the<br/>6 within deposition shall be and the same are waived;<br/>7<br/>8 IT IS FURTHER STIPULATED AND AGREED that<br/>9 all objections, except as to the form of the<br/>10 question, shall be reserved to the time of trial;<br/>11<br/>12 IT IS FURTHER STIPULATED AND AGREED that<br/>13 the within deposition may be signed before a Notary<br/>14 Public with the same force and effect as if signed<br/>15 and sworn to before the court.<br/>16<br/>17 * * *<br/>18<br/>19<br/>20<br/>21<br/>22<br/>23<br/>24<br/>25</p>   | <p>Page 3</p> <p>1 W. EBER<br/>2 MR. HERBERT: John Herbert for Wendy and<br/>3 Lester Eber.<br/>4 THE FOREMAN: Will the court reporter,<br/>5 please, swear in the witness.<br/>6 WENDY EBER, having first been duly sworn by<br/>7 a Notary Public of the State of New York, was<br/>8 examined and testified as follows:<br/>9 EXAMINATION BY MR. BROOK:<br/>10 Q Would you state your name for the record,<br/>11 please.<br/>12 A Wendy Eber.<br/>13 Q Would you state your address for the<br/>14 record, please.<br/>15 A 201 East 80th Street, Apartment 21A, New<br/>16 York, New York 10075.<br/>17 MR. RAMSEY: Like yesterday we're going to<br/>18 read and sign.<br/>19 Q Good morning, Ms. Eber.<br/>20 A Good morning.<br/>21 Q Because we have done this a couple of<br/>22 times with the 30(b)(6) depositions I'm going to<br/>23 presume that you know how this works but if you have<br/>24 any questions, please, let me know. I'm going to<br/>25 use the same general definitions as before in terms</p>   |

2 (Pages 2 - 5)

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| <p>1                   W. EBER</p> <p>2   Q  Yes.</p> <p>3   A  Yes.</p> <p>4   Q  When did that occur, the negotiation?</p> <p>5   A  I don't remember. What year is this?</p> <p>6   Q  Again, your email is dated June 2011.</p> <p>7   A  I know he claimed he had another offer</p> <p>8 from another company so I don't remember the</p> <p>9 details.</p> <p>10   Q In the notes on the right of that table it</p> <p>11 says, "John Slocum has an employment contract which</p> <p>12 expires in January 2012." Do you see that?</p> <p>13   A  Yes.</p> <p>14   Q When was that employment contract executed</p> <p>15 to the best of your recollection?</p> <p>16   A I don't know if I was involved at the</p> <p>17 time. I did note when I was reading the merger</p> <p>18 document there were a lot of contracts in there. He</p> <p>19 may have had one at the time, but I wasn't involved</p> <p>20 in his contract.</p> <p>21       THE WITNESS: Can we take a break.</p> <p>22       MR. BROOK: Sure.</p> <p>23       VIDEOGRAPHER: The time is 10:52. We're</p> <p>24 off the record.</p> <p>25       VIDEOGRAPHER: Time is 11:04. We are on</p> | <p>Page 42</p> <p>1                   W. EBER</p> <p>2   A It could have been the Teamsters.</p> <p>3   Q Could it have been PBGC?</p> <p>4   A No.</p> <p>5   Q Why do you say that?</p> <p>6   A This isn't something that I recall giving</p> <p>7 to the PBGC.</p> <p>8   Q Do you recall giving a presentation to the</p> <p>9 Teamsters in or about December 2011?</p> <p>10   A I did meet with them a couple of times.</p> <p>11 This could have been to maybe a bank too, trying to</p> <p>12 get a loan from a bank.</p> <p>13   Q Who prepared this presentation?</p> <p>14   A I believe I did.</p> <p>15   Q Did anyone assist you in preparing the</p> <p>16 presentation?</p> <p>17   A I don't remember. It may have been to a</p> <p>18 bank. I'm not sure.</p> <p>19   Q In terms of, you know, the date of</p> <p>20 December 29th of 2017 that's printed on this there</p> <p>21 is -- I got some questions in terms of just how</p> <p>22 documents were generally prepared for</p> <p>23 production in this case, because that date is after</p> <p>24 this lawsuit was filed; correct?</p> <p>25   A Yes.</p>   |
| <p>1                   W. EBER</p> <p>2 the record.</p> <p>3       MR. BROOK: All right. Go to another</p> <p>4 exhibit now. This one is being marked as</p> <p>5 Exhibit 69. It bears Bates EB31025 through</p> <p>6 034.</p> <p>7       (Ten-page document was marked</p> <p>8 as Plaintiff's Exhibit 69 for</p> <p>9 identification.)</p> <p>10   Q Do you recognize this document?</p> <p>11       (Witness reviewing document.)</p> <p>12   A Sort of. I'm confused by this date,</p> <p>13 12/29/2017.</p> <p>14   Q So according to the first page where it</p> <p>15 say Slocum and Sons December 2011 in the middle and</p> <p>16 the bottom left it says 12/29/17.</p> <p>17   A Yes.</p> <p>18   Q Is that the date when you printed this</p> <p>19 document perhaps from Microsoft Power Point?</p> <p>20   A I don't remember. I believe it was</p> <p>21 created December 12, 2011.</p> <p>22   Q Was it a presentation that was given on</p> <p>23 December 12, 2011?</p> <p>24   A I believe so, yes.</p> <p>25   Q What was the presentation given to?</p>  | <p>Page 43</p> <p>1                   W. EBER</p> <p>2   Q Who was involved in reviewing documents</p> <p>3 that were on computers for Slocum and Sons in order</p> <p>4 to respond to document requests in this case?</p> <p>5   A Me.</p> <p>6   Q Anyone else?</p> <p>7   A No.</p> <p>8   Q So do you recall opening up Microsoft Word</p> <p>9 and Microsoft Power Point files and printing those</p> <p>10 out?</p> <p>11   A Yeah, I did print out or send them to Paul</p> <p>12 electronically, our lawyer electronically, yes.</p> <p>13   Q And when you searched for emails did you</p> <p>14 follow the same process of either forwarding the</p> <p>15 email or printing them?</p> <p>16   A Yes.</p> <p>17   Q How did you decide whether to print an</p> <p>18 email or to forward it?</p> <p>19   A I don't recall individual things.</p> <p>20   Q When you saw emails with attachments did</p> <p>21 you print out the attachments as well?</p> <p>22   A I believe I did. I believe I did, yes,</p> <p>23 but I don't know if I did everyone but I believe so.</p> <p>24   Q Prior to this litigation was it your</p> <p>25 practice to regularly print out emails that you sent</p> |

12 (Pages 42 - 45)

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| <p style="text-align: right;">Page 46</p> <p>1                   W. EBER<br/>     2 or received?<br/>     3   A Sorry?<br/>     4   Q Before getting involved in with litigation<br/>     5 and having to look for documents was it your<br/>     6 practice just in terms of your day-to-day operation<br/>     7 of the business to print out emails that you sent or<br/>     8 received?<br/>     9   A You know, I printed out some emails, yes,<br/>     10 if they were, I thought something that I thought was<br/>     11 important or that I wanted to remember to do<br/>     12 something I would at times print the email.<br/>     13   Q What did you do with the emails that you<br/>     14 printed out during the regular course of business<br/>     15 after you printed them, meaning what you did with<br/>     16 the hard copies?<br/>     17   A It depends, sometimes I file them<br/>     18 sometimes left them on my desk, sometimes I did<br/>     19 whatever I needed to do with them and I throw them<br/>     20 in the garbage. It depends on what the email was.<br/>     21   Q Did you have any particular practice or<br/>     22 routine when it came to organizing your email inbox?<br/>     23   A No.<br/>     24   Q Did you regularly delete emails that you<br/>     25 received?</p> | <p style="text-align: right;">Page 48</p> <p>1                   W. EBER<br/>     2 wendyefry@Gmail.com.<br/>     3   Q Why did you start that account?<br/>     4   A I got married and I, you know, thought it<br/>     5 would be nice. Sometimes I go by Fry socially<br/>     6 because of my husband.<br/>     7   Q Did you legally change your name to Fry?<br/>     8   A My driver's license says Wendy Eber.<br/>     9   Q When you filed for your marriage license<br/>     10 did you request to change your name with the state?<br/>     11   A Yes.<br/>     12   Q What is your legal name as a result of<br/>     13 that?<br/>     14   A Wendy Fry.<br/>     15   Q And what is your middle name or initial?<br/>     16   A P.<br/>     17   Q Do you ever use your nyc.rr.com email<br/>     18 account to communicate with individuals relating to<br/>     19 the Eber businesses?<br/>     20   A No.<br/>     21   Q Do you use the nyc.rr.com account to<br/>     22 communicate with Lester?<br/>     23   A I don't recall. I may have used it but<br/>     24 not typically.<br/>     25   Q Have you used the Gmail account to</p>   |
| <p style="text-align: right;">Page 47</p> <p>1                   W. EBER<br/>     2   A I did delete emails.<br/>     3   Q Did you also save emails in some way such<br/>     4 as through an archive or folder system?<br/>     5   A No, not really. No.<br/>     6   Q What email service did you use? Was it<br/>     7 Microsoft Outlook?<br/>     8   A Yes.<br/>     9   Q Did you use Microsoft Outlook at all times<br/>     10 since 2008?<br/>     11   A Yes.<br/>     12   Q Did you use Microsoft Outlook for both<br/>     13 business and personal accounts or only business<br/>     14 accounts?<br/>     15   A I have a Gmail account but I have Outlook<br/>     16 for work.<br/>     17   Q Since about 2008, I just want to focus on<br/>     18 the time period from 2008 forward. Please, tell me<br/>     19 all the different email addresses that you have used<br/>     20 to send or receive email whether for business or<br/>     21 personal reasons.<br/>     22   A From 2008 I have my work email which is<br/>     23 weber@slocumandsons.com and then I have an email<br/>     24 address weber4@nyc.rr.com and then I have a Gmail<br/>     25 account which I started in 2013, or something. It's</p>  | <p style="text-align: right;">Page 49</p> <p>1                   W. EBER<br/>     2 communicate with Lester?<br/>     3   A I don't recall.<br/>     4   Q Have you used the Gmail account to<br/>     5 communicate with anyone related to the Eber<br/>     6 businesses?<br/>     7   A No.<br/>     8   Q In responding to Discovery requests in his<br/>     9 case did you search your nyc.rr.com email account?<br/>     10   A No.<br/>     11   Q Did you search your Gmail account?<br/>     12   A No.<br/>     13   Q Why not?<br/>     14   A I don't use that typically to communicate<br/>     15 with people from work, for work related things.<br/>     16   Q But when you responded to my questions a<br/>     17 moment ago you weren't sure if you communicated with<br/>     18 Lester using those accounts; correct?<br/>     19   MR. RAMSEY: Form.<br/>     20   A I don't typically communicate with Lester<br/>     21 with my -- if I'm communicating with Lester it's for<br/>     22 work. It's with my work account. If maybe my<br/>     23 mother emails my father and I'm on it with him about<br/>     24 a family thing it might be on another account but<br/>     25 typically I communicate with Lester about work</p> |

13 (Pages 46 - 49)

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| <p style="text-align: right;">Page 50</p> <p>1                   W. EBER<br/>     2 related thing with my work account.<br/>     3   Q  And you're -- how confident are you about<br/>     4 the fact that you probably have not communicated<br/>     5 with Lester through your personal email accounts at<br/>     6 any point since 2008?<br/>     7   MR. RAMSEY: Form.<br/>     8   A  What?<br/>     9   Q  Are you saying that you remember that you<br/>     10 didn't communicate with Lester using your personal<br/>     11 account at that time?<br/>     12   MR. RAMSEY: Form.<br/>     13   A  I don't typically use -- if I'm going to<br/>     14 communicate with Lester I usually talk to him. It's<br/>     15 usually a conversation. I call him all the time. I<br/>     16 call him a couple of times a day or we talk by phone<br/>     17 or I see him in the office. You know, that's how I<br/>     18 communicate with Lester.<br/>     19   Q  Have any of your friends or family members<br/>     20 who are not parties to this lawsuit communicated<br/>     21 with you about this lawsuit or the issues in it?<br/>     22   A  I have spoken to my mother, yes.<br/>     23   Q  What did you and your mother discuss about<br/>     24 this lawsuit?<br/>     25   A  Not a lot of details, just it's more her</p>                                | <p style="text-align: right;">Page 52</p> <p>1                   W. EBER<br/>     2   Q  What is your understanding as to when<br/>     3 Lester had that conversation with him?<br/>     4   A  When?<br/>     5   Q  Yes.<br/>     6   A  My understanding was that, um, Dan<br/>     7 Kleeberg had a conversation with Mark Stein and Mark<br/>     8 Stein said he had learned about the Article 9 sale<br/>     9 and that he told Danny about it and then Danny told<br/>     10 Lester about it and then Lester told me about his<br/>     11 conversation with Danny.<br/>     12   Q  What did Lester tell you about that<br/>     13 conversation?<br/>     14   A  I believe it was before Sally died.<br/>     15   Q  What do you recall Lester telling you<br/>     16 about what Dan said in response to him informing him<br/>     17 about the transaction?<br/>     18   A  Danny was well aware of the monies that<br/>     19 Lester had been lending into the company and<br/>     20 understood all these third-party creditors,<br/>     21 specifically the PBGC.<br/>     22   Q  Just let me clarify. You're talking about<br/>     23 what Lester told you Dan had said at the time? I'm<br/>     24 not asking what you think Dan would do. I'm asking<br/>     25 you specifically what you recall Lester telling you</p>  |
| <p style="text-align: right;">Page 51</p> <p>1                   W. EBER<br/>     2 concern and it's more the hurt feelings. Were a<br/>     3 family and I went to Danny's wedding in 1974. I<br/>     4 went to Lisa's wedding. I went to Audrey's wedding.<br/>     5 We celebrate Passover together. We celebrated<br/>     6 Thanksgiving together. We celebrated Rosh Hashanah<br/>     7 together for the last, for Lester 60- 70 years, and,<br/>     8 um, it's more about just how hurtful it is and those<br/>     9 type of emotional feelings.<br/>     10   Q  When you got married to Eric Fry were any<br/>     11 of my clients in attendance?<br/>     12   A  They were. They came to my wedding.<br/>     13   Q  All of them?<br/>     14   A  Lisa was there. Sally was there. Danny<br/>     15 was there, and Danny's son was there.<br/>     16   Q  Was Audrey Hays there?<br/>     17   A  Audrey was not there. Her husband was<br/>     18 very sick at the time. She couldn't make it.<br/>     19   Q  When is the first time that you recall<br/>     20 discussing with Dan Kleeberg the fact that the trust<br/>     21 no longer owned Eber Connecticut?<br/>     22   A  I didn't have that conversation with him.<br/>     23   Q  Not before this lawsuit was filed?<br/>     24   A  No. Lester had that conversation with<br/>     25 him.</p> | <p style="text-align: right;">Page 53</p> <p>1                   W. EBER<br/>     2 that Dan had said in response to him informing him<br/>     3 of the transaction.<br/>     4   A  That he understood. I mean, I don't -- I<br/>     5 think what I was trying to say is he understood that<br/>     6 Lester had been putting in a lot of money into the<br/>     7 company, loaning money into the companies to save<br/>     8 the companies and he understood that and that, you<br/>     9 know.<br/>     10   Q  Was anything about this conversation ever<br/>     11 documented?<br/>     12   MR. RAMSEY: Form.<br/>     13   A  Well, there was an email from Danny to<br/>     14 Lester which basically Danny was asking Lester for<br/>     15 to find him another job and to continue paying him a<br/>     16 consulting fee from the company and, um, he, you<br/>     17 know, he knew Lester was loaning money into the<br/>     18 company so if Lester had to loan the money in he<br/>     19 didn't necessarily need the money but he would like<br/>     20 to continue to get the consulting fee so, um.<br/>     21   Q  So that email was after the conversation<br/>     22 that he had with Lester?<br/>     23   A  No. I think that was before. That was<br/>     24 in, I think, 209 when he was looking to get, looking<br/>     25 for money to be paid as a consultant.</p> |

14 (Pages 50 - 53)

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| <p style="text-align: right;">Page 54</p> <p>1                   W. EBER</p> <p>2   Q  My question is focused on whether there<br/>3 was any documentation, whether just email<br/>4 memorializing it or notes or anything like that that<br/>5 was made about the conversation that Lester said he<br/>6 had with Dan Kleeberg in or around 2014 at the time<br/>7 or afterwards not something that you think supports<br/>8 it before.</p> <p>9        MR. RAMSEY: Form. Go ahead.</p> <p>10      A  I didn't document it. I don't know if<br/>11 Lester documented it. I didn't document that<br/>12 phonecall or that conversation.</p> <p>13      Q  Did Lester explain to you how the topic<br/>14 came up?</p> <p>15      A  No. I think that Danny and Lester spoke<br/>16 very frequently about lots of subjects, especially<br/>17 after the company closed or wound down and, you<br/>18 know, also Danny was a supplier of Connecticut so we<br/>19 did business with him and sold his products.</p> <p>20      Q  I'm sorry. Can you -- I think you may<br/>21 have said this but was this conversation that Lester<br/>22 said he had with Dan before or after Sally died?</p> <p>23      A  I believe it was before Sally died but<br/>24 I -- yeah. I believe it was before and he<br/>25 understood. I don't think Danny was angry. I don't</p> | <p style="text-align: right;">Page 56</p> <p>1                   W. EBER</p> <p>2 the pension benefit so then her lawyer sued Eber<br/>3 Brothers and then he got into negotiations with the<br/>4 PBGC and Eber Brothers.</p> <p>5   Q  This was all before the Alexbay<br/>6 transaction; right?</p> <p>7   A  No. This was after -- well, he signed<br/>8 where he misrepresented that they didn't have a<br/>9 Quadro, that was before the Alexbay.</p> <p>10     Q  What do you mean by a Quadro?</p> <p>11     A  Qualified Domestic Relations Order, which<br/>12 designated that Gail Kleeberg was entitled to half<br/>13 of his pension plan.</p> <p>14     Q  What is your basis for saying that he made<br/>15 that representation with intentional falsity?</p> <p>16     MR. RAMSEY: Form.</p> <p>17     A  Because he signed a document that said<br/>18 that he didn't have one when, in fact, he did have<br/>19 one.</p> <p>20     Q  So it's your view that if someone signs a<br/>21 document that says something then they are<br/>22 responsible for ensuring the accuracy of everything<br/>23 that's in that document?</p> <p>24     MR. RAMSEY: Form. He testified at this<br/>25 own deposition.</p>  |
| <p style="text-align: right;">Page 55</p> <p>1                   W. EBER</p> <p>2 think he -- you know, nothing comes up in my mind<br/>3 that Danny was upset about anything because my<br/>4 understanding was that Danny knew that Lester had<br/>5 been lending money into the company, and I had<br/>6 conversations with Danny about the pension<br/>7 obligations with the PBGC and he was aware of that<br/>8 liability.</p> <p>9   Q  When was the conversation that you had<br/>10 with Dan regarding the PBGC?</p> <p>11   A  Um, do you have the interrogatories?<br/>12 Because you know this is -- they're all detailed in<br/>13 the interrogatories.</p> <p>14   MR. RAMSEY: Just whatever your best<br/>15 recollection is today. Whatever your best<br/>16 recollection is today.</p> <p>17   A  I had several conversation with Danny<br/>18 about the PBGC. His wife sued Eber -- excuse me.<br/>19 His ex-wife, Gail Kleeberg sued Eber Brothers<br/>20 because he falsified a document saying that he<br/>21 didn't have a Quadro to get his pension plan and so<br/>22 he wasn't paying his ex-wife the pension, the<br/>23 pension she was entitled to through the Quadro so at<br/>24 that point there was no administrator on the pension<br/>25 plan to change the designation of the ex-wife to get</p>                              | <p style="text-align: right;">Page 57</p> <p>1                   W. EBER</p> <p>2        THE WITNESS: Right. He testified to this<br/>3 at his own deposition.</p> <p>4   Q  Have you ever signed a document that<br/>5 contained any factual inaccuracies?</p> <p>6   A  I don't recall. I mean, I may have, yes,<br/>7 signed something.</p> <p>8   Q  Has Lester signed any documents that<br/>9 contain factual inaccuracies that you're aware of?</p> <p>10    MR. RAMSEY: Form.</p> <p>11    A  May have, I don't know all the specifics.<br/>12 I'm just --</p> <p>13    MR. RAMSEY: Wait. Wait for a question.</p> <p>14    Q  I wants to focus on your conversations<br/>15 with Dan Kleeberg after the transfer of Eber Metro<br/>16 to Alexbay. During any of those conversations with<br/>17 Dan Kleeberg did you tell Dan Kleeberg that PBGC was<br/>18 trying to collect money from Eber Connecticut?</p> <p>19    A  I didn't use those words but I did use the<br/>20 words that the companies had a pension liability and<br/>21 the companies were responsible for that pension<br/>22 liability which is going back to why -- just stay<br/>23 with me here. Eber Brothers had a lawyer<br/>24 representing it with the PBGC. Dan Kleeberg wanted<br/>25 to use Eber Brothers lawyer to represent him with</p> |

15 (Pages 54 - 57)

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| <p style="text-align: right;">Page 58</p> <p>1                   W. EBER<br/> 2 the PBGC because Gail Kleeberg's lawyer had<br/> 3 contacted the PBGC about Gail's Kleeberg's situation<br/> 4 about not receiving her benefit. So all of those<br/> 5 things I had discussed with Dan so Dan knew we were<br/> 6 talking to the PBGC about the liability there. He<br/> 7 knew that.</p> <p>8     Q   And did you tell anything to Dan about the<br/> 9 specifics of what PBGC was trying to find out in<br/> 10 terms of the information about Eber Connecticut?</p> <p>11    A   What do you mean?</p> <p>12    Q   Well, PBGC was trying to get a lot of<br/> 13 information from you about Eber Connecticut and what<br/> 14 its financials were and its operations; correct?</p> <p>15    A   Well, at some points they were and at<br/> 16 other points we were talking negotiating with them.<br/> 17 It went on for a very long time.</p> <p>18    Q   I'm asking about the inquiries regarding<br/> 19 Eber Connecticut. I understand there's other things<br/> 20 there. Did you tell Dan Kleeberg about the fact<br/> 21 that PBGC was making inquiries about Eber<br/> 22 Connecticut's finances?</p> <p>23    A   I may have. I don't remember the<br/> 24 specifics. I remember him saying that he called the<br/> 25 PBGC without an attorney and spoke with an attorney</p> | <p style="text-align: right;">Page 60</p> <p>1                   W. EBER<br/> 2     A   We were always trying to negotiate with<br/> 3 the PBGC to determine what we could pay, afford to<br/> 4 pay.</p> <p>5     Q   So my question is --</p> <p>6     A   So, yes.</p> <p>7     Q   -- PBGC took the position during those<br/> 8 negotiations -- I'm sorry. Eber Connecticut took<br/> 9 the position during the negotiation with PBGC that<br/> 10 Eber Connecticut was not legally obligated to make<br/> 11 payments to the pension plan of Eber Brothers Wine<br/> 12 and Liquor Corp.; correct?</p> <p>13       MR. RAMSEY: Form.</p> <p>14       A   There was negotiations. We always knew<br/> 15 that we had to pay something. There were liens on<br/> 16 Connecticut.</p> <p>17       Q   Well, you fought against the lien on<br/> 18 Connecticut; correct?</p> <p>19       A   Well, originally they put a lien on<br/> 20 Connecticut. There's -- I'm not an ERISA lawyer.</p> <p>21       Q   I'm not asking you --</p> <p>22       A   Well, I think this is an important point.<br/> 23 There are things called statutory liens, which I<br/> 24 don't know if you took this class in law school or<br/> 25 not but these things just arise so they don't even</p>          |
| <p style="text-align: right;">Page 59</p> <p>1                   W. EBER<br/> 2 there and I said, Danny, you need a lawyer to speak<br/> 3 to them. You can't just call them up, and so that's<br/> 4 what we got into this whole conversation about<br/> 5 having Eber Brothers represent Danny.</p> <p>6     Q   I really want to try to get this done<br/> 7 today so I would really appreciate if you answered<br/> 8 my question about a minute earlier, so let's stay<br/> 9 focused on that. So when you might have spoken with<br/> 10 Dan about PBGC making inquiries about Eber<br/> 11 Connecticut's finances and operations did you<br/> 12 indicate to Dan Kleeberg that Eber Connecticut was<br/> 13 trying to avoid making payments to PBGC to fund the<br/> 14 pension benefit?</p> <p>15    A   What?</p> <p>16    Q   Well, Eber Connecticut wasn't willingly<br/> 17 making payment to PBGC for a period of years;<br/> 18 correct?</p> <p>19       MR. RAMSEY: Form.</p> <p>20    A   The companies could not afford to make<br/> 21 payments. Yes, we were not making payments.</p> <p>22    Q   And Eber Connecticut took the position<br/> 23 that it did not have to make payments to PBGC; isn't<br/> 24 that correct?</p> <p>25       MR. RAMSEY: Form.</p>  | <p style="text-align: right;">Page 61</p> <p>1                   W. EBER<br/> 2 have to put a lien on it. These are theoretical<br/> 3 liens. Right. So there were liens. And I don't<br/> 4 understand all the legalese to it but there were<br/> 5 liens that came on and then a lien came off and a<br/> 6 lien went back on.</p> <p>7       MR. RAMSEY: All right. You answered<br/> 8 question.</p> <p>9       A   I mean it's a very --</p> <p>10      Q   Did you tell Dan Kleeberg that Eber<br/> 11 Connecticut was taking the position that it did not<br/> 12 have to fund the pension benefits as a result of the<br/> 13 Alexbay transaction?</p> <p>14      A   No. I didn't tell him. I don't believe I<br/> 15 told him something like that because I always<br/> 16 believed that --</p> <p>17       MR. RAMSEY: You answered the question.</p> <p>18      Q   I'm going to focus to you on this Exhibit<br/> 19 69, page three of it. See the bulletpoints? The<br/> 20 third one says, "While we're losing money we have a<br/> 21 plan in place to become profitable this year. As a<br/> 22 result of our efforts are projecting our EBITDA to<br/> 23 go from negative \$535,000 to positive 305,000 by May<br/> 24 of 2012." Do you see that?</p> <p>25      A   Yes.</p> |

16 (Pages 58 - 61)

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| <p style="text-align: right;">Page 62</p> <p>1                   W. EBER<br/>     2   Q  And EBITDA is different than net income;<br/>     3 correct?<br/>     4   A  Correct.<br/>     5   Q  What does EBITDA stand for?<br/>     6   A  Earning before interest, tax,<br/>     7 depreciation.<br/>     8   Q  And amortization?<br/>     9   A  Amortization.<br/>     10   Q  Did Eber Connecticut keep track of what<br/>     11 its EBITDA was?<br/>     12   A  I believe so, for the bank.<br/>     13   Q  Were there financial statements prepared<br/>     14 that included lines on what the EBITDA was?<br/>     15   A  You mean audited financial statements?<br/>     16   Q  Not necessarily, maybe just a simple<br/>     17 spreadsheet or regular emails saying what the EBITDA<br/>     18 was.<br/>     19   A  Yes. I think we had convenience around<br/>     20 these types of, um, convenience which was related to<br/>     21 the EBITDA, yes.<br/>     22   Q  So why in this presentation were you<br/>     23 pointing out what the EBITDA was rather than talking<br/>     24 about net income numbers?<br/>     25   A  I think this was for the bank. I think</p>  | <p style="text-align: right;">Page 64</p> <p>1                   W. EBER<br/>     2   Q  And was it taxed as a distributor as well?<br/>     3   A  What kind? You mean state tax?<br/>     4   Q  What kind of state taxes were imposed on<br/>     5 Eber Connecticut as a result of its business as a<br/>     6 distributor?<br/>     7   A  You mean sales tax?<br/>     8   Q  Did it pay sales taxes?<br/>     9   A  I believe there are some -- there's, like,<br/>     10 gallonage tax but I don't know if that relates to<br/>     11 this tax number here.<br/>     12   Q  Were there sales taxes?<br/>     13   A  I'm not sure. I'm not sure. I don't do<br/>     14 the taxes so I don't know specifically. I don't<br/>     15 know if -- this is an LLC and I think this tax<br/>     16 number -- I'm not sure necessarily relates to, um,<br/>     17 the tax. I think it's more the depreciation and the<br/>     18 interest that would be an add back here. Those<br/>     19 would be the factors really impacting this number.<br/>     20   Q  So the interest was primarily interest on<br/>     21 bank loans; is that right?<br/>     22   A  Yes.<br/>     23   Q  Was there any other significant interest<br/>     24 expense?<br/>     25   A  I don't think so. I think it all related</p>  |
| <p style="text-align: right;">Page 63</p> <p>1                   W. EBER<br/>     2 this presentation was for a bank, trying to get a<br/>     3 bank loan.<br/>     4   Q  And so why was EBITDA being used with the<br/>     5 banks instead of net income.<br/>     6   A  Just to show -- I think the banks look at<br/>     7 EBITDA.<br/>     8   Q  What is your understanding as to why they<br/>     9 use EBITDA instead of net income?<br/>     10   A  It's before interest and tax and<br/>     11 depreciation. I still think EBITDA may have been<br/>     12 negative in 2012.<br/>     13   Q  It says that right there. I wasn't asking<br/>     14 about that. For the EBITDA numbers that Eber<br/>     15 Connecticut prepared for the bank, or otherwise,<br/>     16 were all of the taxes that were paid by Eber<br/>     17 Connecticut taken out or were there some taxes that<br/>     18 remained there in there as expenses effecting the<br/>     19 EBITDA number?<br/>     20   MR. RAMSEY: Form. Go ahead.<br/>     21   A  I don't know.<br/>     22   Q  So as far as Eber Connecticut's business<br/>     23 is it fair to say it had to be licensed by the State<br/>     24 of Connecticut to be a distributor?<br/>     25   A  Yes.</p> | <p style="text-align: right;">Page 65</p> <p>1                   W. EBER<br/>     2 to loans.<br/>     3   Q  I want to focus your attention on page<br/>     4 nine of this. Actually, I'm sorry page eight. So<br/>     5 refers here to cost savings efforts, identify the<br/>     6 following opportunities, and it refers to three<br/>     7 things there. Is it correct to understand this as<br/>     8 saying these are opportunities for further cost<br/>     9 savings or that these are the three items that are<br/>     10 not things that had not already taken place by that<br/>     11 point?<br/>     12   A  So this is something from December. This<br/>     13 is fiscal year 2012. It may have been something we<br/>     14 were in the process of implementing because it would<br/>     15 have been during our fiscal 2012 year. So it was<br/>     16 probably in process.<br/>     17   Q  So finance contracted out resulting in<br/>     18 \$100,000 savings. What is that referring to?<br/>     19   A  That was going back to Wally being hired<br/>     20 as a consultant as opposed to Dave Dean who was a<br/>     21 full-time employee who had FICA and health care and<br/>     22 all that stuff.<br/>     23   Q  When was Wally given the title of CFO?<br/>     24 Was it at some point later?<br/>     25   A  Yeah. Well, he would start out as a</p> |

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| <p style="text-align: right;">Page 182</p> <p>1                   W. EBER</p> <p>2   Q Under the terms of the will if Lester had</p> <p>3 died in 2016 who would have gotten control of Eber</p> <p>4 Brothers and Co. Inc. stock?</p> <p>5   A It's irrelevant.</p> <p>6   Q Is it irrelevant when you're determining</p> <p>7 the interpretation of what the intent of the will</p> <p>8 was?</p> <p>9       MR. RAMSEY: Form.</p> <p>10   A The intent of the will, it's right in</p> <p>11 there that says Lester while he is living is running</p> <p>12 the company.</p> <p>13   Q It doesn't say that.</p> <p>14   A It says Lester's running the company.</p> <p>15    MR. RAMSEY: We're going to take five</p> <p>16 minutes here.</p> <p>17   VIDEOGRAPHER: The time is 15:52. We are</p> <p>18 off the record.</p> <p>19   VIDEOGRAPHER: The time is 15:57. We are</p> <p>20 on the record.</p> <p>21   Q As secretary of Eber Brothers and Co. Inc.</p> <p>22 you are in control of the stock book and ledger for</p> <p>23 the company; correct?</p> <p>24   A Correct.</p> <p>25   Q Where is that located?</p>   | <p style="text-align: right;">Page 184</p> <p>1                   W. EBER</p> <p>2   A At the time I wasn't sure.</p> <p>3   Q So did you ever tell the bank that you had</p> <p>4 found the stock book?</p> <p>5   A Basically what I said was I would look for</p> <p>6 it. I think it was like in June and then I said I</p> <p>7 would look for it over Fourth of July weekend and I</p> <p>8 never heard back from the bank and then it was like</p> <p>9 in a black hole. No one said anything back to me.</p> <p>10   Q So you were waiting for the bank to tell</p> <p>11 you, yes, please look for it?</p> <p>12   A Right, but it's really irrelevant because</p> <p>13 it wouldn't be -- well, whatever.</p> <p>14   Q Why do you say it's irrelevant?</p> <p>15   A Because we have the stock books. We have</p> <p>16 them.</p> <p>17   Q Okay. Had you told your lawyer that you</p> <p>18 did not have the stock book?</p> <p>19    MR. RAMSEY: Form. Stop. Communications</p> <p>20 with your counsel.</p> <p>21    MR. BROOK: Not when he disclosed it.</p> <p>22 Let's look at this here. This is Exhibit 40</p> <p>23 previously marked. It's an email from Jim Pazzona</p> <p>24 to a lawyer for CNB stating, "Dear Melissa, I trust</p> <p>25 you received my voicemail of yesterday afternoon</p>                                     |
| <p style="text-align: right;">Page 183</p> <p>1                   W. EBER</p> <p>2   Q Where in Rochester?</p> <p>3   A 95 Allens Creek Road.</p> <p>4   Q How long has it been at that location for?</p> <p>5   A Since we moved. The company moved from</p> <p>6 155 Paragon Drive.</p> <p>7   Q Okay, and was it in Lester Eber's personal</p> <p>8 office or in another part of the office space there?</p> <p>9   A I'm not exactly sure where. It probably</p> <p>10 was between the two. It might have been in his</p> <p>11 personal office. They're connected.</p> <p>12   Q Did you have some difficulty in locating</p> <p>13 that stock ledger in about mid '17?</p> <p>14       MR. RAMSEY: Form.</p> <p>15   A We were, um -- I told the bank or what we</p> <p>16 basically said -- I wasn't exactly sure where it was</p> <p>17 and I was going up to Rochester over Fourth of July</p> <p>18 and I said I would look for it then.</p> <p>19   Q Why did you tell them that you would look</p> <p>20 for the stock book? What was the reason for the</p> <p>21 inquiry.</p> <p>22   A The bank had requested.</p> <p>23   Q What was your understanding as to what the</p> <p>24 bank wanted to do with the stock book?</p> <p>25       MR. RAMSEY: Form.</p> | <p style="text-align: right;">Page 185</p> <p>1                   W. EBER</p> <p>2 regarding your inquiry as to the corporate stock</p> <p>3 book of Eber Brothers and Co. Inc. I am fairly</p> <p>4 confident that they do not have it, however to be</p> <p>5 sure Wendy will be in Rochester over the Fourth of</p> <p>6 July weekend and will double check."</p> <p>7   A Yes. This is incorrect.</p> <p>8   Q What about this is incorrect?</p> <p>9   A That -- I didn't say I'm confident that</p> <p>10 they don't have it. I didn't -- I said I would look</p> <p>11 for it is what I said. I don't necessarily know</p> <p>12 where it is. I will go look for it. I'm going to</p> <p>13 be up there Fourth of July weekend and then I didn't</p> <p>14 here anything.</p> <p>15   Q So you're saying you did not authorize</p> <p>16 your lawyer to tell CNB that he was confident that</p> <p>17 you didn't have the stock book?</p> <p>18   A No, I didn't say that. I just said this</p> <p>19 is incorrect.</p> <p>20   Q So you did authorize him to --</p> <p>21       MR. RAMSEY: No. This is not a waiver of</p> <p>22 privilege here. Whatever he said, he said.</p> <p>23 But that doesn't mean a waive of any privilege.</p> <p>24 She's saying that this is inaccurate.</p> <p>25   Q Now, was this email here forwarded to you?</p> |

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2 UNITED STATES DISTRICT COURT  
3 SOUTHERN DISTRICT OF NEW YORK  
4 Civil Action No.: 16-cv-9517 (LAK)

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6 DANIEL KLEEBERG, LISA STEIN and AUDREY HAYS,

7

Plaintiff,

8

-against-

9

10 LESTER EBER; ALEXBAY, LLC f/k/a LESTER EBER,  
11 LLC; CANANDAIGUA NATIONAL CORPORATION d/b/a  
12 CANANDAIGUA NATIONAL BANK & TRUST; ELLIOT  
13 W. GUMAER, JR.; EBER BROS. & CO., INC., EBER  
14 BROTHERS WINE AND LIQUOR CORPORATION;  
15 BROS. WINE AND LIQUOR METRO, INC.,  
16 EBER-CONNECTICUT, LLC; and WENDY EBER,

Defendants.

17

-----x  
18 1250 Broadway

19

New York, New York 10001

20

June 28, 2019

21

9:42 a.m.

22

CONTINUED VIDEOTAPED DEPOSITION OF WENDY EBER  
held at the above-mentioned time and place before  
ANNMARIE OAKLEY, a Notary Public of the State of  
New York.

23

24

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|--|---|
| <p>1<br/>2 APPEARANCES<br/>3<br/>4 BROOK &amp; ASSOCIATES PLLC<br/>Attorneys for Plaintiffs<br/>5 100 Church Street, 8th Floor<br/>New York, New York 10007<br/>6<br/>7 BY: BRIAN BROOKS, ESQ.<br/>8<br/>9 UNDERBERG &amp; KESSLER LLP<br/>Attorneys for Defendants<br/>10 LESTER EBER; ALEXBAY, LLC f/k/a LESTER EBER, LLC;<br/>EBER BROTHERS &amp; CO., INC; EBER BROS. WINE AND LIQUOR<br/>11 CORPORATION; EBER BROS. WINE AND LIQUOR METRO, INC.,<br/>EBER-CONNECTICUT, LLC; and WENDY EBER<br/>12 50 Fountain Plaza<br/>Buffalo, New York 14202<br/>13<br/>BY: COLIN RAMSEY, ESQ.<br/>14<br/>15<br/>16 CALIHAN LAW PLLC<br/>Attorneys for Defendant<br/>17 THE ESTATE OF ELLIOT W. GUMAER<br/>16 Main Street<br/>18 Rochester, New York 14614<br/>19 BY: ROBERT B. CALIHAN, ESQ.<br/>20<br/>21 Also present: PHIL GALUBERSON, videographer<br/>22 DAN KLEEBERG, telephonically<br/>23<br/>24<br/>25</p>   | <p>Page 219</p> <p>1 W. EBER<br/>2 financially interested in the outcome. Counsel<br/>3 and all present in the room will now state<br/>4 their appearances and affiliations for the<br/>5 record.<br/>6 MR. BROOK: Brian Brook of Brook &amp;<br/>7 Associates, counsel for plaintiff is here, and<br/>8 one of my clients, Daniel Kleeberg, is on the<br/>9 telephone.<br/>10 MR. RAMSEY: Colin Ramsey from Underberg &amp;<br/>11 Kessler for the Eber defendants.<br/>12 MR. CALIHAN: Rob Calihan on behalf of<br/>13 Calihan Law representing the estate of Elliot<br/>14 Gumaer.<br/>15 VIDEOGRAPHER: Will the record, please,<br/>16 swear in the witness.<br/>17 W E N D Y E B E R, having been previously sworn by<br/>18 a Notary Public of the State of New York, was<br/>19 examined and testified as follows:<br/>20 EXAMINATION BY MR. BROOK:<br/>21 Would you state your name for the record, please.<br/>22 A Wendy Eber.<br/>23 Q Would you state your address for the<br/>24 record, please.<br/>25 A 201 East 80th Street, Apartment 21A, New</p>   |
| <p>1<br/>2 W. EBER<br/>3<br/>4 VIDEOGRAPHER: Good morning, we are going<br/>5 on the record at 9:42 a.m. on June 28, 2019.<br/>6 Please, note that the microphones are sensitive<br/>7 and may pick up whispers, private conversation<br/>8 and cellular interference. Please, turn off<br/>9 all cellphones or place them away from the<br/>10 microphones as they can interfere with the<br/>11 deposition audio. Audio and video recording<br/>12 will continue to take place unless all parties<br/>13 agree to go off the record. This is media unit<br/>14 one, day two of the video recorded deposition<br/>15 of Wendy Eber in the matter of Daniel Kleeberg<br/>16 versus Lester Eber et al. filed in the United<br/>17 States District Court Southern District of New<br/>18 York, Civil Action number 16-cv-9517(LAK)<br/>19 MR. BROOK: 9517.<br/>20 VIDEOGRAPHER: This deposition is being<br/>21 held at Veritext, located at 1250 Broadway, New<br/>22 York, New York. My name is Phil Glauberson<br/>23 from the firm Veritext and I am the<br/>24 videographer. The court reporter is Annmarie<br/>25 Oakley from the firm Veritext. I am not<br/>authorized to administer an oath. I am not<br/>related to any party in this action, nor am I</p> | <p>Page 220</p> <p>1 W. EBER<br/>2 York, New York 10075.<br/>3 Q Good morning, Ms. Eber.<br/>4 A Good morning.<br/>5 Q I want to start out by asking if, you know<br/>6 we had three days before in these depositions, if<br/>7 there's any reason why you may think that I may need<br/>8 to go over how this deposition is going to work or<br/>9 how you should be addressing my questions, if you<br/>10 don't understand and things like that?<br/>11 MR. RAMSEY: The grounds rule.<br/>12 Q Do we need to go over the ground rules?<br/>13 A Okay, you can.<br/>14 Q Well, the court reporter is taking down<br/>15 everything that we say so the most important thing<br/>16 is we try not to talk over each other. If I ask you<br/>17 a question if there's any part of it that you don't<br/>18 understand you should say that to me because if you<br/>19 answer the question I'm going to assume that you<br/>20 understood it.<br/>21 A Okay.<br/>22 Q And those are the, I think, two of the<br/>23 basics. We have a limited amount of time here but<br/>24 breaks don't count for that so if you need to take a<br/>25 break you can do so, just say it. The only thing I</p> |

2 (Pages 219 - 222)

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| <p style="text-align: right;">Page 323</p> <p>1                   W. EBER</p> <p>2        MR. BROOK: Who at Eder Goodman.</p> <p>3       A It was also between Pat Dalton. I think</p> <p>4       the lawyers were involved in it as well.</p> <p>5       Q So you think the lawyers might have wanted</p> <p>6       you to get the right of first refusal?</p> <p>7       A No. I'm saying the lawyers were involved</p> <p>8       in the whole thing so the whole negotiation as well.</p> <p>9       Q So are you -- but what does that have to</p> <p>10      do with who at Eder Goodman insisted that you get</p> <p>11      this right of first refusal?</p> <p>12      A I don't remember exactly.</p> <p>13      MR. BROOK: This is Exhibit 121 and</p> <p>14      jumping forward this is an email dated March 9,</p> <p>15      2012, Bates number EB31199.</p> <p>16      (EB31199 was marked as</p> <p>17      Plaintiff's Exhibit 121 for</p> <p>18      identification.)</p> <p>19      Q This is an email that you printed out;</p> <p>20      correct?</p> <p>21      A Yes.</p> <p>22      Q And it's one that you sent to Mike Gumaer;</p> <p>23      correct?</p> <p>24      A Yes.</p> <p>25      Q And the subject says it's a forward of</p>                                      | <p style="text-align: right;">Page 325</p> <p>1                   W. EBER</p> <p>2       the foreclosure action so he knew what you were</p> <p>3       talking about here?</p> <p>4       A I don't remember the exact dates because</p> <p>5       this is, you know, seven years ago here but I know</p> <p>6       that Mike was aware of all of the loans that Lester</p> <p>7       had put into the company. He was aware of all of</p> <p>8       the liabilities that the company faced and he was,</p> <p>9       he knew generally what was going on in the company.</p> <p>10      Q My question is about the foreclosure</p> <p>11      action.</p> <p>12      A I don't recall exactly when he found out</p> <p>13      but he was aware.</p> <p>14      MR. BROOK: Let's mark this as Exhibit</p> <p>15      122, Bates EB26652.</p> <p>16      (EB26652 was marked as</p> <p>17      Plaintiff's Exhibit 122.)</p> <p>18      Q This is sent four days later on March 13,</p> <p>19      2012 from Mike to you; correct?</p> <p>20      A Right.</p> <p>21      Q And he says, "Wendy, We'll talk at 4 p.m.</p> <p>22      I'm not in a position to discuss in any depth the</p> <p>23      Alex Bay matter as I learned of the matter yesterday</p> <p>24      afternoon in the email from Underberg." Let me stop</p> <p>25      there. Do you know what email from Underberg he was</p> |
| <p style="text-align: right;">Page 324</p> <p>1                   W. EBER</p> <p>2 something January Eber CT. Do you see that?</p> <p>3       A Yes.</p> <p>4       Q Where's the forwarded text?</p> <p>5       A I don't know.</p> <p>6       Q Did you delete that.</p> <p>7       A No. I mean, I didn't delete anything. I</p> <p>8 haven't deleted anything from the time you sued us</p> <p>9 so, I mean, I don't know if this may have been a</p> <p>10 printout. I don't know.</p> <p>11      Q In the email you said, "Mike, Please</p> <p>12      confirm that you have a conference call today at 4</p> <p>13      p.m. with Glenn and that he will be in Rochester on</p> <p>14      Tuesday and Wednesday next week. You need to speak</p> <p>15      with Rick Hawks." message importance is high;</p> <p>16      correct?</p> <p>17      A Yes.</p> <p>18      Q Why was it that you said that Mike Gumaer</p> <p>19      needed to speak with Rick Hawks?</p> <p>20      A I think this is the time of the</p> <p>21      foreclosure or the filing of the foreclosure</p> <p>22      documents and there were numerous phonecalls, I</p> <p>23      think, and meetings that week regarding the</p> <p>24      foreclosure.</p> <p>25      Q Had you already apprized Mike Gumaer of</p> | <p style="text-align: right;">Page 326</p> <p>1                   W. EBER</p> <p>2 referring to there?</p> <p>3       A I'm not certain. I mean, I do have a copy</p> <p>4 of it.</p> <p>5       Q I'm asking if you know. When you say</p> <p>6 you're not certain what are you referring to?</p> <p>7       MR. RAMSEY: You're not certain what he's</p> <p>8 referring to?</p> <p>9       THE WITNESS: No.</p> <p>10      Q Do you believe you asked Underberg to</p> <p>11      forward him a copy of the Alex Bay Complaint?</p> <p>12      A I may have. I just don't remember.</p> <p>13      Q And so is it fair to say that you had not</p> <p>14      discussed the Alex Bay foreclosure action with Mike</p> <p>15      Gumaer prior to Monday, March 12, 2012?</p> <p>16      MR. RAMSEY: Form.</p> <p>17      A Well, he was well aware of the loans that</p> <p>18      Lester put into --</p> <p>19      Q Focus on the foreclosure action not the</p> <p>20      loans themselves.</p> <p>21      A Right. He was well aware but I'm not sure</p> <p>22      exactly when he was notified of the foreclosure</p> <p>23      action but he knew about the loans and he knew about</p> <p>24      the financial situation of the company and all the</p> <p>25      liabilities out there that Lester was financing</p>  |

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| <p style="text-align: right;">Page 327</p> <p>1                   W. EBER<br/>2 everything.<br/>3   Q Just so we're clear, because you gave a<br/>4 long answer there, are you disputing the statement<br/>5 here that according to Mike Gumaer he learned of the<br/>6 matter the day before the date of this email in an<br/>7 email from Underberg?<br/>8    MR. RAMSEY: Form.<br/>9    A He learned of the foreclosure?<br/>10   Q Yes. Do you dispute that?<br/>11   A Well, that's what's written here.<br/>12   Q Do have any basis to dispute that?<br/>13   A I don't know.<br/>14   Q Next line says, he wrote, "Hawks will be<br/>15 interested in knowing as will I what will be the<br/>16 status of the Eber trust with respect to Eber assets<br/>17 held in the trust. You may wish to have someone<br/>18 from Underberg on hand to address these issues." and<br/>19 then it says "on the survive" which I think means<br/>20 surface, "it looks like Lester is moving against the<br/>21 trust to which he is a cotrustee." Do you see that?<br/>22   A Yes.<br/>23   Q Can you think of anything other than what<br/>24 surface, what word he might have meant if it wasn't<br/>25 surface in that last sentence?</p> | <p style="text-align: right;">Page 329</p> <p>1                   W. EBER<br/>2 think, board meetings. I had numerous call with<br/>3 him.<br/>4    Q So I'm asking, I'm try together<br/>5 understand, do you recall anything specifically that<br/>6 you told him in terms of new information that he<br/>7 didn't already have to allay his concern that on the<br/>8 surface it looked like Lester was moving against the<br/>9 trust of which he was a cotrustee.<br/>10    MR. RAMSEY: Form.<br/>11    A He's stating that that's what it looks<br/>12 like and that's what it was. Lester was moving<br/>13 against company. Yes.<br/>14    MR. BROOK: This is going to be 123. This<br/>15 is an email and an attachment sent on March 12,<br/>16 2012 from you to, looks like, Marino Fernandez<br/>17 and Mike Gumaer.<br/>18    (March 12, 2012 email was<br/>19 marked as Plaintiff's Exhibit<br/>20 123 for identification.)<br/>21   Q Do you see that.<br/>22   A Yes.<br/>23   Q It looks like you had scanned or someone<br/>24 had scanned for you a term sheet with CNB about Eber<br/>25 Connecticut, well, not just a term sheet but a</p> |
| <p style="text-align: right;">Page 328</p> <p>1                   W. EBER<br/>2    A I don't know.<br/>3    Q Do you recall discussing this concern with<br/>4 Gumaer?<br/>5    A Yes. Yes.<br/>6    Q What did say to him about it?<br/>7    A Well, you know, just as I have said<br/>8 throughout this deposition we -- and actually this<br/>9 week we, you know, that March 13th week we had many,<br/>10 many calls about, you know, all the monies that<br/>11 Lester had loaned into the company. The --<br/>12   Q He was already well aware of that though;<br/>13 right?<br/>14   A Who?<br/>15   Q You just said that Mike Gumaer was already<br/>16 well aware of the loans and everything and he still<br/>17 had these concerns, so I'm asking you to focus on<br/>18 what you said after this point in response to his<br/>19 concerns.<br/>20   A Right. That we talked about what Lester<br/>21 was doing. I had a lot of conversations with him<br/>22 about the loans that were secured loans, all the<br/>23 debts that Eber Brothers had, the continued legacy<br/>24 liabilities, all that information, the financial<br/>25 distress of the companies and he was -- we had, I</p>                                 | <p style="text-align: right;">Page 330</p> <p>1                   W. EBER<br/>2 signed and executed term sheet to Mike Gumaer and<br/>3 Marino Fernandez. Why were you doing that?<br/>4    A I don't know. I don't remember.<br/>5    Q And Marino Fernandez asked -- just to make<br/>6 sure we're on the same page, Marino Fernandez was<br/>7 the lawyer that was retained by Eber Brothers Wine &amp;<br/>8 Liquor Corp. to represent it in the foreclosure<br/>9 action; is that right?<br/>10   A Yes.<br/>11   Q Can you recall what he was doing looking<br/>12 at this bank loan?<br/>13   A I don't remember.<br/>14   Q Can you recall what the relevance was of<br/>15 the bank loan to anything that was going on at the<br/>16 time?<br/>17    MR. RAMSEY: Form.<br/>18    A No. I mean that we were --<br/>19    MR. RAMSEY: Hold on. If you remember you<br/>20 remember. Don't speculate.<br/>21   A No.<br/>22    MR. BROOK: All right. We're up to 124.<br/>23 Now in is email with Bates number 26650 with an<br/>24 attachment, Bates number 26650 and the<br/>25 attachment with Bates numbers 26650A and B.</p>                         |

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| <p style="text-align: right;">Page 331</p> <p>1                   W. EBER<br/>     2                   (Bates 26650A to 26650B was<br/>     3                   marked as Plaintiff's Exhibit<br/>     4                   124 for identification.)<br/>     5     A   Yes.<br/>     6     Q   So this is the consent form by which the<br/>     7     board of Eber Brothers Wine &amp; Liquor, at the time<br/>     8     was just you and Mike Gumaer, consented to the<br/>     9     transfer of stock from Alex Bay to satisfy the<br/>     10   obligations to Alex Bay; correct?<br/>     11   A   Yes.<br/>     12   Q   Is it correct that this is a document that<br/>     13   was drafted by Underberg Kessler?<br/>     14   A   Looks like it was.<br/>     15   Q   Why was Underberg Kessler drafting a<br/>     16   resolution for Eber Brothers Wine &amp; Liquor Corp.?<br/>     17    MR. RAMSEY: Form.<br/>     18   A   I don't know.<br/>     19   Q   And this email was sent by someone at<br/>     20   Underberg Kessler, looking at the second one before<br/>     21   you forwarded it, sent from somebody named Marcy<br/>     22   McQue (phonetic) from Marcy Davis McQue. I'm not<br/>     23   sure I follow that. Do you know who that is?<br/>     24   A   Where?<br/>     25   Q   In the email that you were forwarding, so</p> | <p style="text-align: right;">Page 333</p> <p>1                   W. EBER<br/>     2     this email who was a lawyer representing Eber<br/>     3     Brothers Wine &amp; Liquor Corp.?<br/>     4     A   On this email that is correct.<br/>     5     Q   Was there a lawyer for Eber Brothers Wine<br/>     6     &amp; Liquor Corp. that every reviewed this document?<br/>     7     A   Maybe. I don't remember.<br/>     8     Q   Who did you think that lawyer might have<br/>     9     been?<br/>     10   A   Marino, Mike Gumaer was also a lawyer too.<br/>     11   Q   I want to ask you some questions about<br/>     12   your communications with Marino Fernandez now that<br/>     13   the court has ruled that's something that is subject<br/>     14   to Discovery. When did you first speak with Marino<br/>     15   Fernandez about the foreclosure action?<br/>     16   A   I don't remember the exact date. I don't<br/>     17   remember.<br/>     18   Q   Do you recall what you discussed? About<br/>     19   what our needs were?<br/>     20   A   I don't -- I mean, that's many years ago.<br/>     21   It's, like, seven years ago. I don't really<br/>     22   remember all the details.<br/>     23   Q   What, if any, questions did you ask Marino<br/>     24   Fernandez to look into?<br/>     25   A   I don't remember. Like, specific</p> |
| <p style="text-align: right;">Page 332</p> <p>1                   W. EBER<br/>     2     looking down about a third way of the page, it's<br/>     3     from somebody named Marcy McQue. It looks like<br/>     4     she's an administrative assistant. Do you know her<br/>     5     personally?<br/>     6     A   No.<br/>     7     Q   And she was sending this to you, to<br/>     8     Lester, to Glenn Sturm, to David Belt; right? Do<br/>     9     you see that?<br/>     10   A   Yes.<br/>     11   Q   And copying several lawyers at Underberg &amp;<br/>     12   Kessler; is that right?<br/>     13   A   Yes.<br/>     14   Q   So there were a lot of lawyers on this<br/>     15   email; correct?<br/>     16   A   There's a lot of lawyers on this email.<br/>     17   Yes.<br/>     18   Q   But Marino Fernandez was not one of the<br/>     19   lawyers on this; correct?<br/>     20   A   He's not on this email, no.<br/>     21   Q   And you never sent him this document to<br/>     22   review?<br/>     23    MR. RAMSEY: Form.<br/>     24   A   I don't remember.<br/>     25   Q   And so is it correct there was no one on</p>  | <p style="text-align: right;">Page 334</p> <p>1                   W. EBER<br/>     2     conversations and stuff?<br/>     3     Q   Or just general issues. Was there<br/>     4     anything in particular that you wanted Marino<br/>     5     Ferandez to do to protect the rights of Eber<br/>     6     Brothers Wine &amp; Liquor Corp.?<br/>     7     A   I mean, sitting here I just don't<br/>     8     remember. I don't recall.<br/>     9     Q   What did he tell you his qualifications<br/>     10   were to do this kind of corporate work?<br/>     11    MR. RAMSEY: Form.<br/>     12   A   Well, he was a lawyer that was recommended<br/>     13   to us by Paul Keneally. So it's a small community<br/>     14   in Rochester. Everyone, kind of, knows each other<br/>     15   on the legal front so I thought he was a good<br/>     16   choice.<br/>     17   Q   Did Marino Fernandez offer any opinions<br/>     18   about the foreclosure action?<br/>     19    MR. RAMSEY: Form.<br/>     20    MR. CALIHAN: Form.<br/>     21   A   As far as what?<br/>     22    MR. BROOK: What's the objection?<br/>     23    MR. CALIHAN: A formal opinion or --<br/>     24   Q   Did he offer any opinions on whether Eber<br/>     25   Brothers Wine &amp; Liquor Corp. should consent to</p>  |

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| <p style="text-align: right;">Page 335</p> <p>1                   W. EBER</p> <p>2 Lester's request to take the shares of Eber Metro in<br/>3 full satisfaction of the debts?</p> <p>4   A  If we should?</p> <p>5   Q  Yes.</p> <p>6   A  There weren't any alternatives. I mean,<br/>7 Brian, there's no money to pay for anyone here.<br/>8 There are no alternatives. So, yeah, I mean it's<br/>9 just -- this is, kind of, a situation where we<br/>10 waived all of our defenses and that was suggested by<br/>11 him.</p> <p>12   Q  He suggested waiving all your defenses?</p> <p>13   A  There weren't any defenses. There's no<br/>14 money here. There's no money to pay Marino, let<br/>15 alone, you know, do anything. Who's going to pay<br/>16 for the defenses? Yeah.</p> <p>17   Q  It was a decision to waive defenses out of<br/>18 the concern of the cost; is that right?</p> <p>19       MR. RAMSEY: Form.</p> <p>20   A  Well, just resources, cost, there's no<br/>21 defenses. Yeah. I mean, yes, he supported that.</p> <p>22   Q  And did you get anything in writing from<br/>23 him in terms of any legal opinions?</p> <p>24       MR. RAMSEY: Form.</p> <p>25   A  A written legal opinion?</p> | <p style="text-align: right;">Page 337</p> <p>1                   W. EBER</p> <p>2   Q  And in terms of your discussions with<br/>3 either Marino Fernandez or Glenn Sturm was there any<br/>4 discussion about how the transfer of Eber Metro to<br/>5 Alex Bay would effect the shareholders and the value<br/>6 of the shareholders in Eber Brothers Wine &amp; Liquor<br/>7 Corp.?</p> <p>8       MR. RAMSEY: Form.</p> <p>9   A  Say that again.</p> <p>10   Q  Let me rephrase. Was there any discussion<br/>11 about how the transfer of Eber Metro to Alex Bay<br/>12 would effect the value of the shares of Eber<br/>13 Brothers Wine &amp; Liquor Corp. for the shareholders?</p> <p>14   A  With?</p> <p>15   Q  With either Glenn Sturm or Marino<br/>16 Fernandez?</p> <p>17   A  You know, sitting here today I don't<br/>18 recall. I'm sure there were conversations. I just<br/>19 don't remember, like, a specific conversation.</p> <p>20       MR. RAMSEY: Okay. Then you answered the<br/>21 question.</p> <p>22   Q  And so when you say you're sure it makes<br/>23 it a little confusing. Do you recall any general<br/>24 conversation or what their conclusion was about the<br/>25 value of the shares and how that would be effected?</p> |
| <p style="text-align: right;">Page 336</p> <p>1                   W. EBER</p> <p>2   Q  Any written legal opinion, even just an<br/>3 email?</p> <p>4   A  No. I don't know if -- I don't think<br/>5 there was a written opinion. No.</p> <p>6   Q  And who was on the discussion with him<br/>7 when he apparently gave you the opinion about waving<br/>8 all the defenses?</p> <p>9       MR. RAMSEY: Form.</p> <p>10   A  You have the minutes right, so there was a<br/>11 meeting, I think, in --</p> <p>12   Q  Just the board meeting, then with Lester<br/>13 and Mike Gumaer?</p> <p>14   A  And I believe he was on one of the calls<br/>15 too. We had many calls and he was on the call,<br/>16 Gumaer was on the call. Then I called Gumaer, Mike<br/>17 at a later date. I spoke with Marino later dates.<br/>18 I don't know if you have the minutes or not.</p> <p>19       MR. RAMSEY: All right. You answered the<br/>20 question.</p> <p>21   Q  Did you consult with any other lawyers,<br/>22 besides Marino Fernandez, about how the transfer of<br/>23 Eber Metro would affect Eber Brothers Wine &amp; Liquor<br/>24 Corp.?</p> <p>25   A  I may have talked to Glenn about it.</p>                    | <p style="text-align: right;">Page 338</p> <p>1                   W. EBER</p> <p>2   A  I just don't. You know, there was a lot<br/>3 of things going on I don't remember. The companies<br/>4 were insolvent.</p> <p>5       MR. RAMSEY: You answered the question.</p> <p>6   You don't remember. The answer is okay.</p> <p>7       MR. BROOK: Let's go to Exhibit 125.<br/>8 Start off by asking -- well, let me put the<br/>9 Bates number. It appears to be part of an<br/>10 email with Bates number EB31212 and an<br/>11 attachment of EB31212A.<br/>12 (EB31212 and EB31212A was<br/>13 marked as Plaintiff's Exhibit<br/>14 125 for identification.)</p> <p>15   Q  What happened to the top part of this<br/>16 email?</p> <p>17   A  I don't know.</p> <p>18       MR. BROOK: We'll request that a complete<br/>19 copy of this be provided or that the redaction<br/>20 log be provided that explains why a document<br/>21 that has already been produced is being<br/>22 produced in redacted form, and I just want to<br/>23 request that I am requesting it for the record.</p> <p>24   Q  So because one of the problems here is<br/>25 this doesn't have a date or anything on it but I</p>  |

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| <p style="text-align: right;">Page 339</p> <p>1                   W. EBER<br/>     2 will -- hopefully if you need a second to read it<br/>     3 but hopefully you can answer some questions on it<br/>     4 anyway. Do you know who Jim is in this email?<br/>     5   A I believe it's Jim Frizano. (phonetic)<br/>     6   Q And you're sending to him a proforma<br/>     7 analysis of how the trust should be distributed; is<br/>     8 that right?<br/>     9   A Yes.<br/>     10   Q Why was this prepared?<br/>     11   A Well, this was prepared because<br/>     12 Canandaigua wanted to distribute the trust and they<br/>     13 sent out, like, their -- how they were going to<br/>     14 distribute it, and one of the items that they didn't<br/>     15 take into consideration was that Erica Stein was<br/>     16 getting distributions from the trust, which were<br/>     17 supposed to be subtracted from Lisa Stein's portion<br/>     18 of the trust.<br/>     19   Q Okay. So you were providing different<br/>     20 numbers for how you believe the assets should be<br/>     21 distributed versus what CNB had initially proposed?<br/>     22   A For the -- not anything to do with the<br/>     23 Eber Brothers equity, only the marketable securities<br/>     24 so the Eber, you notice, was taken out. I didn't do<br/>     25 anything with that. This was just on the account</p> | <p style="text-align: right;">Page 341</p> <p>1                   W. EBER<br/>     2   Q Subsequent to sending this proforma<br/>     3 analysis to Jim Frizano did you make any further<br/>     4 adjustments to what you thought the distribution of<br/>     5 marketable assets should be?<br/>     6   A What do you mean?<br/>     7   Q Well, after, whenever you sent this to Jim<br/>     8 Frizano, did you find any errors in here or find<br/>     9 anything that you think needed to changed in how it<br/>     10 would effect the ultimate distribution?<br/>     11   A I think this was the only -- I don't<br/>     12 remember if this was the final. I think this was<br/>     13 the final one. I mean, I don't know if they used<br/>     14 this one. They used something else I think.<br/>     15   Q But this is what you believe they should<br/>     16 have done; is that fair?<br/>     17   A I believe so, yes.<br/>     18   Q In your email you also mention something<br/>     19 in this second paragraph, "Since the Woods Oviatt<br/>     20 bills are being paid by the trust include charges<br/>     21 from the SDNY litigation, it's only fair that our<br/>     22 legal bills are paid as well by the trust." Did you<br/>     23 ever take any further steps to try to get legal<br/>     24 bills paid for by the trust?<br/>     25   A I don't believe so, no. I did note that</p> |
| <p style="text-align: right;">Page 340</p> <p>1                   W. EBER<br/>     2 balance of the marketable cash and, you know, traded<br/>     3 stocks and things like that.<br/>     4   Q Okay. So it was in your view appropriate<br/>     5 to change the distribution of marketable securities<br/>     6 and other liquid assets but not to change anything<br/>     7 having to do with Eber Brothers &amp; Co. stock; is that<br/>     8 right?<br/>     9   A Right. So you will see, like, the bank<br/>     10 said that, like, Lisa and Danny should get \$113,000<br/>     11 but -- well, Lisa should get \$113,000 but see she<br/>     12 should have been adjusted out the monies that were<br/>     13 advanced to Erica, about \$75,217, that were advanced<br/>     14 to Erica. So, you know, her adjusted distribution<br/>     15 on the marketable security should been about<br/>     16 \$50,566.<br/>     17   Q Who created this proforma analysis?<br/>     18   A I worked on it.<br/>     19   Q Did anyone else help you with it?<br/>     20   A I may have had some help with it.<br/>     21   Q Who may have helped you with it?<br/>     22   A I don't remember.<br/>     23   Q Are you proficient on how to use Microsoft<br/>     24 Excel yourself?<br/>     25   A Yes. I have a business degree.</p>  | <p style="text-align: right;">Page 342</p> <p>1                   W. EBER<br/>     2 they were -- there were a lot of bills from Woods<br/>     3 Oviatt that were taken out of the trust, yeah.<br/>     4   Q And do you know whether it's correct that<br/>     5 that included the SDNY litigation bills, that those<br/>     6 were actually taken from the trust?<br/>     7   A They may have been. They may have been.<br/>     8 I don't remember at this time. I don't remember if<br/>     9 I wrote this or not. You know, I would have gotten<br/>     10 it from -- I think there's was an allocation of<br/>     11 something and I was going through that report or<br/>     12 that document and I saw this so that's why I would<br/>     13 have asked for this but --<br/>     14   Q You saw Woods Oviatt bills; right?<br/>     15   A Yeah.<br/>     16   Q Do you know whether those were bills for<br/>     17 the SDNY litigation or for the surrogates court<br/>     18 proceeding?<br/>     19   A I'm not sure. I don't know.<br/>     20   Q Did you ever see the Woods Oviatt bills?<br/>     21   A For the trust or the SDNY?<br/>     22   Q For whatever was paid for by the trust.<br/>     23   A There were some details in some documents<br/>     24 I believe that did have some -- you could see the<br/>     25 lawyers billings, so there were some bills I think.</p>                   |